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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 298

PEYTON PACKING COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EUGENE T. EDWARDS,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Peyton Packing Company, Inc., respectfully shows that the record here consists of (1) a transcript of the record of proceedings before the National Labor Relations Board, designated as Volume I, below, and here referred to as R. —; with (2) a supplementary record consisting of proceedings before the Circuit Court of Appeals, herein referred to as S. R. —; and (3) appendix to brief of the Board which was petitioner below, herein referred to as Board Appdx. —; together with appendix to brief of Peyton Packing Co., Inc., respondent below, herein designated as P. P. Co. Appdx. —.

Summary Statement of Matter Involved.

Based on charges filed by Amalgamated Meat Cutters & Butcher Workmen of N. A., A. F. of L., Local 606, the National Labor Relations Board on October 23, 1942, instituted proceedings under the National Labor Relations Act against petitioner, Peyton Packing Company, Inc., alleging that it had discriminatorily discharged twenty employees (R. 10-13).

Justifiable grounds, not now necessary to mention, were set out by the company for the discharges of eight of these men, and as to the other twelve it was shown as a defense that their employment was terminated in May, 1942, because of their wilful violation of the following rule which had been posted in both English and Spanish more than three months previously:

> "NOTICE TO ALL EMPLOYEES
>
> NO EMPLOYEE SHALL ENGAGE IN SOLICITATION OF ANY KIND WHILE ON PROPERTY OF THIS COMPANY, OR WHILE WORKING ON COMPANY TIME. DISREGARD OF THIS RULE WILL RESULT IN IMMEDIATE DISCHARGE AND NO EXCEPTIONS WILL BE MADE" (R. 18-22).

After close of the evidence the trial examiner found as to all employees that there had been no discrimination and no wrongful conduct by petitioner (Intermediate Report, Dec. 22, 1942, R. 27-52).

The National Labor Relations Board itself on May 18, 1943, made a decision sustaining the trial examiner except as to the employees discharged for violation of the rule above set out, but as to those nine the board held it beyond the lawful power of this petitioner to promulgate and enforce such a rule; that an attempt to do so was discriminatory and an unfair labor practice and ordered petitioner to reinstate them with back pay (R. 67-103).

Two were eliminated from the reinstatement order by amendment of June 10, 1942 (R. 120-123).

Petitioner pleaded as a defense at the hearing before the trial examiner (R. 18-22), and the undisputed evidence showed:

1. Petitioner packs meat and employs an average of 370 men (Harris, P. P. Co. Appdx. 49).

2. In March, 1940, *prior to present proceeding*, a *C. I. O. union* filed charges with the National Labor Relations Board against petitioner alleging interference with rights of employees and favoritism toward an employees' association (Harris, P. P. Co. Appdx. 50-52).

3. A hearing before a trial examiner was had on that charge, and on January 13, 1941, in his intermediate report he found that employees were solicited to join such association during working hours (P. P. Co. Appdx. 52), and this was used by the board in its former order and decision of June 11, 1941, as a contributing factor to its holding therein that petitioner had violated Section 8(2) of the Act (P. P. Co. Appdx. 53).

4. No appeal was taken from this decision and after extended correspondence between petitioner's attorney and the board's Sixteenth Regional Director (Exhibits 23, and 24 of the company, in evidence P. P. Co. Appdx. 55-56), regarding the terms of the notice to be posted, the company on Sept. 23, 1941, posted such notices (P. P. Co. Appdx. 204, Exhibit 22, in evidence P. P. Co. Appdx. 54), a portion of its procedure being conditioned on the result of a decision by this Court in the case of *National Labor Relations Board* v. *Virginia Electric & Power Company*, then pending.

5. The notices informed petitioner's employees that it would not support the Association and would not inter-

fere with, restrain or coerce its employees in their right to self-organization, etc. (See Company Exhibit 22, mentioned above.)

6. Aside from, and independently of, such notice the company had issued strict orders that the Act must be complied with as regards all labor matters (Peyton, P. P. Co. Appdx. 175; Miles, 173; Gandara, 151; Chauvet, 92; Hamilton 95-96; and Kessler, 120).

7. On December 22, 1941, this court decided the case of *National Labor Relations Board* v. *Virginia Electric & Power Company* (314 U. S. 469) but did not pass on the question in which this petitioner was interested, and information of this fact reached it early in January, 1942 (Harris, P. P. Co. Appdx. 56).

8. Thereupon, petitioner sought advice of its attorney as to means of preventing a recurrence of the conditions in the plant which led to the prior charge by the C. I. O. and its attendant complaint, hearing and order of the board, and was advised by such attorney to post, in both English and Spanish, a written notice setting forth its policy as shown by a copy of such notice prepared by said attorney as set out above (Harris, P. P. Co. Appdx. 58; Miles, 171; Peyton, 176; Board Exhibit 8, Board Appdx. 141, in Evidence Board Appdx. 28).

9. Such notice was posted in conspicuous places in the plant on January 26, 1942, and copies have been kept posted at all times since (Harris, P. P. Co. Appdx. 61).

10. At least one copy of such notice was torn down and carried to Allen Williams, an organizer for the complaining union herein at some time prior to the discharges in May, 1942, as hereinafter set out (Williams, P. P. Co. Appdx. 6; Harris, 62). This notice was discussed by Williams at union meetings prior to any of the discharges;

and the contents and meaning of such notice were known to and fully understood by all of the employees who were subsequently discharged for its violation (Lopez, P. P. Co. Appdx. 7; Quintana, 17; Alarcon, 20-21; Renteria, 10-11; Diaz, 12; Barreda, 13; Arciniaga, 14-15; Alarcon, 19; Mena, 25; and Ochotorena, 30).

11. At a time after the hearing in the C. I. O. case and before May, 1942, some of respondent's employees, including Espiridion Muro and Raul Aguilar, attempted to form an independent union, and as an initial step procured a charter, notice of the procurement of which appeared in the newspapers and thus came to the attention of the management of the company, whereupon they immediately warned Muro and Aguilar that there was to be no solicitation on company property. Muro and his associates then dropped the whole thing (Muro, P. P. Co. Appdx. 126, 130; Raul Aguilar, 138; Gandara, 165).

12. After posting the rule and before May, 1942, petitioner had refused to permit candidates for political office to solicit votes among its employees; refused to permit a representative of a well-known life insurance company to solicit applications for life insurance; and refused to permit solicitors from the Community Chest, Red Cross and United States War Bond Committees to solicit funds from employees, but petitioner itself undertook this work in behalf of the last-named public organizations (Harris, P. P. Co. Appdx. 67, 77).

13. Early in May, 1942, Muro complained to Gandara, through whom the company had previously warned him not to solicit for an independent union, that solicitation was going on all over the plant for some union other than his own, and expressed dissatisfaction at what he said appeared to be discrimination against him and his associates (Muro, P. P. Co. Appdx. 127; Gandara, 153), all

of which was reported by Gandara to the company (Harris, P. P. Co. Appdx. 63, 85; Gandara, 154; Miles, 172).

14. Petitioner again consulted its attorney for guidance in the light of these circumstances, and he told its officers that they must do one of two things: either tear down the rule and forget about it, and thereby lose all control and discipline they ever had over their men, or enforce the rule by discharging the employees who had violated it; and that no matter which they did they would have another complaint filed against them before the board,—by the C. I. O. or some other association if they didn't discharge the men, and by the A. F. of L. if they did. Petitioner was advised by its attorney to investigate, and have a stenographic record made of interviews with those said to have violated the rule, and if it had been violated, enforce it by discharge (Harris, P. P. Co. Appdx. 82; Gandara, 154; Peyton, 176-177).

15. Following this advice, company officials, who do not speak Spanish, instructed Gandara, who speaks both English and Spanish fluently, to attempt to find out whether the rule had in fact been violated. He did so, and turned in the names of those said by other employees to have been guilty of violation of the rule in question, whereupon officials interviewed thirteen employees, and, following advice of counsel, had a stenographer present. Four of the thirteen were then discharged as the result of such interviews and the others denied having violated the rule. These were informed that further investigation would be made and if it convinced the management that they had in fact violated the rule, they, too would be discharged (Harris, P. P. Co. Appdx. 63; Gandara, 154; See Stenographic reports of interviews; Company Exhibits 2-13 and 17-21. P. P. Co. Appdx. 184-197, in evidence P. P. Co. Appdx. 76).

16. On instructions from the management Gandara made further investigation and reported back that he was unable to get corroboration concerning four men (Jose Fierro, Martin Gaytan, Faustino Cortez and Juan Yudico), and they were not discharged, but he reported additional information relative to the others and consequently their employment was terminated in the second interview by company officials (Harris, P. P. Co. Appdx. 65; Miles, 172; Gandara, 155-166. Reports of interviews P. P. Co. Appdx. 190, 192, 193, 194, 197, 199, 200, 201, 202, in evidence P. P. Co. Appdx. 76).

17. The A. F. of L. Union did thereafter file with the Sixteenth Regional Director of the Board charges of discrimination by the company against those discharged for violation of the rule and also those discharged for other reasons, and this case resulted.

18. Between December 1, 1941, and June 9, 1942, the employment of 114 servants of the Peyton Packing Company, Inc., was ended (Company Exhibit 30, P. P. Co. Appdx. 208, in evidence, P. P. Co. Appdx. 78-79). The union filed charges as to 20 of them. It was not shown or suggested that any of the other 94 were union men.

The board in refusing to accept the findings of its trial examiner wholly disregarded all of the above undisputed evidence, and sought to support its decision against petitioner by certain isolated alleged utterances of minor company employees, which statements, if made, were wholly unauthorized, and, with one exception, were said to have been directed to employees other than those who were actually discharged.

The stenographic reports of the interviews with the men involved and their discharge slips show that the reason for

their discharges was violation of the company rule against solicitation (Company Exhibits 32-45, P. P. Co. Appdx. 213-218, in evidence, P. P. Co. Appdx. 80, 81, 82), and petitioner's president, L. F. Miles, testified under oath that that was the only reason (P. P. Co. Appdx. 172).

The Circuit Court of Appeals sustained the board in every respect and granted its application for enforcement of its order (S. R. 134).

Jurisdiction.

The final decree of the United States Circuit Court of Appeals for the Fifth Circuit was entered July 10, 1944 (S. R. 138).

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925 (28 U. S. Code Section 347 (a)), and Section 10(e) and (f) of the National Labor Relations Act (29 U. S. Code, Section 160(e) and (f)), herein called the Act.

Opinions Below.

The findings of fact, conclusions of law and order of the National Labor Relations Board dated May 18, 1943, and June 10, 1943 (R. 67 and 120), are reported in 49 N. L. R. B. 828, and 50 N. L. R. B. 355, respectively.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was filed June 21, 1944 (S. R. 134), but at this time has not been published in the Federal Reporter.

Questions Involved.

1. Did the Circuit Court of Appeals err in failing to sustain the company's first counter-proposition that:

"The evidence conclusively showing that Gregorio Alarcon, George Arciniaga, Manuel Barreda, Nazario Diaz,

Eugenio Lopez, L. J. Mena, Eduardo Ochotorena, Manuel Quintana and Manuel Renteria were each discharged by the Peyton Packing Company because of its reasonable belief that they had wilfully violated its rule, theretofore posted, forbidding any employee from soliciting on company property or time with discharge plainly stated therein as the penalty for its breach, and the evidence conclusively showing that each of said employees had in fact deliberately violated said rule, respondent was acting entirely within its rights and the discharges were legally proper and it is beyond the Board's power to order reinstatement of any of them as attempted in paragraph 2(a), (b) and (c) in its final order of June 10, 1943."

2. May the National Labor Relations Board and the Circuit Court of Appeals consider as unfavorable evidence against an employer, with respect to whether it had violated the Act, the fact that an official of the employer had declined to confer with an individual who claimed to represent a majority of the company's employees where that individual never at any time produced any proof that he did represent any of them?

3. May the National Labor Relations Board and the Circuit Court of Appeals disregard reasonable, direct, substantial, materially relevant and undisputed evidence favorable to an employer to the effect that the only reason for the discharge of an employee was his violation of a long-posted rule of the company, and support a decision of discriminatory discharge against it solely by indirect and circumstantial evidence consisting of inferences drawn from the fact that an official of the company, when no election to determine a bargaining representative had been held, had declined to confer with a labor organizer who produced no proof that he actually represented any of the company's employees, together with inferences drawn from isolated

and unauthorized remarks by minor employees contrary to the publicly announced policy of the management when in each instance the employee to whom the remarks were attributed denied having made them, and when, if made at all, there is no evidence that they were repeated to any other person, and when no action by the company in harmony with such remarks was ever taken with reference to any person alleged to have been so addressed, with the exception of one who is a self confessed liar and who admitted intentional violation of the rule for which he was discharged?

4. Did the Circuit Court of Appeals err in failing to sustain the company's second counter-proposition that:

The evidence discloses no lawful basis for the Board's findings and conclusions that the company had interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and its order to "cease and desist" as set forth in paragraph 1 (a) and 1 (b) of its order of May 18, 1943 (R. 101-102), supplemented by paragraph 2 (a) to (e), inclusive, on June 10, 1943 (R. 120), is without lawful support.

Reasons for Granting Petition.

1. The petition should be granted because the decision of the Circuit Court of Appeals herein sought to be reviewed, relative to the matter of the company rule, is in conflict with decisions of the Circuit Courts of Appeals for the Sixth and Seventh Circuits:

Midland Steel Products Company v. *National Labor Relations Board,* 113 F. (2d) 800, par. 8-14, C. C. A. 6;

National Labor Relations Board v. *William Davies Company,* 135 F. (2d) 179, par. 6 & 7, C. C. A. 7.

2. The decision also is probably in conflict with applicable decisions of this Honorable Court to the effect that the

Act does not interfere with the normal exercise of the right of the employer to discharge its employees, for example:

National Labor Relations Board v. *Jones & Laughlin Steel Corp'n*, 301 U. S. 1, 46.

3. In disregarding the undisputed evidence favorable to the employer the decision of the court below is further in conflict with the following decisions of this Honorable Court, and Circuit Courts of Appeals:

Chesapeake & Ohio Railway Company v. *Martin*, 283 U. S. 209, 214;

Pennsylvania Railroad Company v. *Chamberlain*, 288 U. S. 333, 343;

National Labor Relations Board v. *Union Pacific Stages*, 99 F. (2d) 153, 177, C. C. A. 9;

National Labor Relations Board v. *Thompson Products*, 97 F. (2d) 13, 15.

4. In considering the fact that one of its officers had declined to confer with a union organizer, who did not furnish any proof of his authority to represent any of the company's employees, as evidence unfavorable to petitioner on the question of whether it had violated the Act, the decision of the Court below is in conflict with the following decisions of the Sixth and Eighth Circuits:

Texarkana Bus Company v. *National Labor Relations Board*, 119 F. (2d) 480, par. 6-10, C. C. A. 8;

National Labor Relations Board v. *Empire Furniture Company*, 107 F. (2d) 92, par. 3, C. C. A. 6;

North Electric Mfg. Co. v. *National Labor Relations Board*, 123 F. (2d) 887, par. 5-6, C. C. A. 6.

5. In holding petitioner responsible for sporadic anti-union statements of unauthorized minor employees the decision below is in conflict with prior decisions of this

Honorable Court and with decisions of other Circuit Courts of Appeals as follows:

National Labor Relations Board v. *Sands Manufacturing Co.*, 306 U. S. 332, 341-342;

Martel Mills v. *National Labor Relations Board*, 114 F. (2d) 624, par. 11, C. C. A. 4;

National Labor Relations Board v. *Empire Furniture Co.*, 107 F. (2d) 92, par. 2, C. C. A. 6;

Kansas City Power & Light Co. v. *National Labor Relations Board*, 111 F. (2d) 340, par. 8, C. C. A. 8;

Ballston Stillwater Knitting Co. v. *National Labor Relations Board*, 98 F. (2d) 758, 762, C. C. A. 2;

Wilson & Co. v. *National Labor Relations Board*, 120 F. (2d) 913, 920, par. 6, C. C. A. 7;

National Labor Relations Board v. *Swank Products*, 108 F. (2d) 872, par. 2-3, C. C. A. 3.

6. It is a matter of national importance that this Honorable Court decide whether any method of procedure for the maintenance of discipline is left open to those employers who, rightly or wrongly, have been found by the board to have violated the Act by a previous toleration of solicitation for membership by representatives of some union said by the board to have been thereby favored.

WHEREFORE, your petitioner prays that a writ of certiorari be issued to review the final decree of the United States Circuit Court of Appeals for the Fifth Circuit entered in that court in the case numbered and entitled on its docket, No. 10,960, *National Labor Relations Board, Petitioner*, v. *Peyton Packing Company, Inc., Respondent*, to the end that this cause may be reviewed by this Court and that the judgment herein of said Circuit Court of Appeals be reversed.

PEYTON PACKING COMPANY, INC.,
By EUGENE T. EDWARDS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 298

PEYTON PACKING COMPANY, INC.,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction and Summary Statement, see pages 8 and 2 of the Petition for Writ of Certiorari herein which are adopted by reference thereto.

Specification of Errors.

The United States Circuit Court of Appeals for the Fifth Circuit erred:

I.

In failing to sustain the proposition that the evidence conclusively showing that Gregorio Alarcon and eight others were each discharged by the Peyton Packing Company because of its reasonable belief that they had wilfully violated its rule against solicitation on company prop-

erty or time, knowing that penalty for its breach was discharge, and the evidence further showing that each of said employees did in fact deliberately violate said rule, the company was within its rights and the discharges were proper.

II.

In considering as unfavorable evidence against the Peyton Packing Company, with respect to whether it had violated the National Labor Relations Act, the fact that an official of the company had declined to confer with an individual who claimed to represent a majority of the company's employees, where that individual never at any time produced any proof that he did represent any of such employees.

III.

In disregarding reasonable, relevant and wholly undisputed evidence favorable to the Peyton Packing Company that its only reason for discharging the employees in question was their violation of a long-posted rule of the company, and resting its decision of discriminatory discharge solely on circumstantial evidence consisting of inferences drawn from the company's refusal to confer with a labor organizer who offered no proof of authority to represent any employee, together with inferences drawn from isolated and unauthorized remarks by minor employees contrary to the company's publicly announced policy.

In failing to sustain the proposition that the evidence discloses no lawful basis for the board's findings and conclusions that the company had interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of The National Labor Relations Act.

Summary of Argument.

POINT A.—The action of the board in this case in ordering reinstatement of discharged employees is an unwarranted interference with the company's right to conduct its affairs in an orderly manner.

POINT B.—The company had a lawful right to refuse to confer with a labor organizer, who pretended to represent a majority of its employees but failed to produce any proof of such claim after written suggestion by the company that he do so, and it cannot be charged with unlawful intent by the exercise of such lawful right.

POINT C.—It was highly prejudicial to the company for the board and Circuit Court of Appeals to brush aside all substantial and undisputed evidence in its favor and decide the case against it on inferences drawn from isolated circumstances in themselves insufficient to overcome the undisputed evidence.

POINT D.—Aside from the matter of the discharges for violation of the company rule, which it is contended were proper, there is no legitimate evidence in the record from which the company's coercion of its employees as regards their rights under the Act may be inferred.

Argument.

POINT A.—(Unwarranted interference.) In its first consideration of the constitutionality of the Act, this Court said in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp'n*, 301 U. S. 1, 46, that

> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them, and the Board may not make its authority a pretext for interference with the right of discharge.

In conformity therewith, Circuit Courts of Appeals have been upholding an employer's right to enforce reasonable rules by discharge as the penalty for violation.

The precise rule now involved first came before such a court for consideration in *Midland Steel Products Company* v. *National Labor Relations Board,* 113 F. (2d) 800, by the Sixth Circuit Court, wherein it was said:

> "The employer has the right on his premises to demand the single-minded attention of the employee to his work. In modern industry the performance of work with efficiency and without physical danger depends not only upon the devotion of the employees to their work, but also upon the amity with which they cooperate.
>
> "The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets in tense discussion before work has been commenced or in the noon hour, may reasonably be expected to carry a certain animus over to work hours. If the rule against solicitation is reasonable, the fact that it is applied to solicitation for union membership does not relieve the employee of his obligation of obedience. Cheek was at liberty to solicit the employees outside of the plant. Inside the plant, in order to secure efficiency, harmony and safety, prior to this controversy, the employer had prohibited solicitation of any kind. The rule was reasonable, as it was calculated to secure concentration of the employees on their work and thus protect the safety of the employees. It was deliberately violated and hence Cheek's discharge was not unlawful." 113 F. (2d) 800, 805, par. 11-14.

In *National Labor Relations Board* v. *William Davies Company,* 135 F. (2d) 179, C. C. A. 7, the rule forbade solicitation on company property or time. The Seventh Circuit Court held that even if the rule were too broad as

applied to solicitation on company property while the employee was on his own time, this would not prevent its application to the case where the employee engaged in such solicitation during working hours.

In the instant case all violations were actually during work hours on company time and there were present not only the elements considered by the Sixth Circuit Court of Appeals to be adequate for its holding in that case, but also the additional and all-compelling reason for the action taken by the Peyton Packing Company, in that if it had not stopped solicitation by the A. F. of L. union when the fact of its existence was urged upon its attention, it would undoubtedly have been charged again by the C. I. O. union before the board with an unfair labor practice, for it had been found by the board in 1940 to have violated the Act by tolerating solicitation, on its premises during work hours, for membership in an employees' association and thereby was said to have been unfair to the C. I. O. union. Under these circumstances it would have been without any defense to such new charges by the C. I. O.

Bear in mind that the rule had been posted in January by the company, on the advice of its attorney, as a means of preventing a recurrence of conditions at the plant which had led to the first charge by the C. I. O. union, and further that the discharges in May for the violations of the rule were also effected upon that attorney's advice that such procedure was the only proper one left open.

Yet the board found that the company had no right to promulgate and enforce such a rule (R. 88), and it is submitted that the decision of the Circuit Court of Appeals for the Fifth Circuit in affirming the order of the board and holding such discharges to be discriminatory is in conflict with the cases to which reference has been made above.

POINT B.—(Improper holding regarding evidence.) Allen Williams, the labor organizer, wrote to J. C. Peyton of the Peyton Packing Company, on May 19, 1942, a letter stating that his union had been designated by a majority of the company's employees to represent them as their collective bargaining agent, and requested an interview (Board Exhibit 2, P. P. Co. Appdx. 181-182).

To this Peyton replied by letter dated May 21, 1942, wherein it was called to Williams' attention that he had furnished the company with no proof of his claim, and advised him that whenever the company was "furnished with proof that such is the desire of the majority, you may rest assured that we will properly meet that situation when and if it arises" (Board Exhibit 3, Board Appdx. 140, in evidence Board's Appdx. 3-4).

The board seized upon this letter of Peyton's as an excuse upon which to find that "Thus faced with the necessity of recognizing the Union and bargaining with it, a duty which the respondent was unquestionably unwilling to fulfill, the respondent was carrying out its threat to 'meet that situation when and if it arises,' by discharging union members in order to destroy the Union's majority" (R. 91), and the Circuit Court of Appeals recites this letter of Peyton's in its opinion as an element contributing to its finding of discrimination on the part of the company (S. R. 136).

Now, in the first place, seven of the nine men involved had already been discharged before May 19, the date of Williams' contact with Peyton (Diaz, May 15,—Board's Appdx. 26; Ochotorena, May 15,—Board's Appdx. 52; Mena, May 15,—Board's Appdx. 46; Renteria, May 18,—Board's Appdx. 22; Lopez, May 18,—Board's Appdx. 5; Barreda, May 18,—Board's Appdx. 28; Arciniaga, May 18,—Board's Appdx. 33), and the investigation had already begun as to all of them, but regardless of the fact that Williams' com-

munication with Peyton came at such a time that it could not have contributed to the initiation of the investigation of the activities of these men as regards their violation of the rule, the fact remains that there had been no election among the company's employees to determine whether any union should be chosen as their representative for purposes of collective bargaining. (Record discloses no election.)

The Act, 29 U. S. Code, par. 150, et seq., imposes on employers the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. (Cf. *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 548, with references to the Railway Labor Act.)

It has, therefore, been held by the Sixth and Eighth Circuit Courts of Appeals that a company's refusal to recognize or confer with an alleged representative who produced no proof that he in fact represented a majority of its employees is not an unfair labor practice.

Texarkana Bus Co. v. *National Labor Relations Board,* 119 F. (2d) 480, par. 6-10, C. C. A. 8;

National Labor Relations Board v. *Empire Furniture Company,* 107 F. (2d) 92, par. 3, C. C. A. 6;

North Electric Mfg. Co. v. *National Labor Relations Board,* 123 F. (2d) 887, par. 5-6, C. C. A. 6.

In the *Texarkana Bus Co.* case, *supra,* it is held that such refusal on the part of the company does not warrant an unfavorable inference against it with respect to whether it had violated the Act, even where the alleged representative really did have the authority, which is in direct conflict with the holding of the court below.

Point C.—(Disregard of undisputed evidence.) As pointed out in the "Summary Statement of Matter Involved" at the beginning of the Petition for Writ of Cer-

tiorari, to which reference is here made, the company's president, L. F. Miles, swore positively at the hearing before the board's trial examiner that the company's only reason for the discharge of the particular men under discussion was their violation of the rule against solicitation.

As further pointed out therein, it was absolutely undisputed that prior to the present charges the company had been held by the board to have violated the Act by toleration of solicitation of membership in an employees' association in competition with the C. I. O.; that thereafter the company was advised by its attorney to post a "no solicitation" rule as a means of preventing a recurrence of circumstances leading to the first charges by the C. I. O.; that all employees affected herein knew of and understood said rule; that the company, in efforts to avoid a repetition of its former difficulties, possibly even before the notice against solicitation was posted, forbade members attempting to form a new independent association from soliciting membership on company property, and after the rule was posted had extended it by enforcing it against political candidates, insurance salesmen, and representatives of charitable organizations; that more than three months after the rule was posted complaint was made by a member of the employees' association that solicitation for membership in some Union other than his own was taking place all over the plant; that violators of the rule were discharged by the company on advice of its attorney that failure to do so would result in charges again being filed against it by the C. I. O. or some union other than the A. F. of L. union; and that notices of impartiality had been posted in writing by the management which had in addition issued to its supervisory employees orders for the maintenance of strict neutrality.

What further precautions could this company possibly have undertaken?

We respectfully submit that those undisputed facts conclusively support Miles' testimony that the only reason for the discharges was the violation of the rule, but the board and the Circuit Court below simply disregarded them in their entirety. In so doing we believe and here allege that said court has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

For instance, in *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. (2d) 153, 177, it is said by the Ninth Circuit Court of Appeals:

"It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act * * * which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence."

The same holding under the Act was also made by the Sixth Circuit in *National Labor Relations Board* v. *Thompson Products*, 97 F. (2d) 13, 15.

There is nothing in the Act itself indicative of Congressional intent that the board or a court in cases arising under that law should discard evidence favorable to an employer and consider only that favorable to an employee. In fact this Honorable Court has itself recently said:

"Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

National Labor Relations Board v. *Indiana & Michigan Electric Company*, 318 U. S. 9, 28.

Consequently decisions of this Court in cases not arising under the Act are applicable, and it has been held that undisputed evidence even though coming from an interested witness may not be disregarded arbitrarily:

Pennsylvania Railroad Company v. *Chamberlain,* 288 U. S. 333.

Chesapeake & Ohio Railway Company v. *Martin,* 283 U. S. 209, 214.

In the present case, overwhelming evidence in favor of the employer was heard, considered and weighed by the trial examiner who found in favor of the employer on every point, but when the board itself, and later the Circuit Court of Appeals, got around to the matter the evidence was still in the record, but it just as well might not have been for it was wholly brushed aside, by reason of which, it is submitted that the decision of the court below is in conflict with all of the authorities to which reference is made above under this point.

Point D.—(No substantial evidence.) If the Peyton Packing Company had no lawful right to make and enforce its rule against solicitation, then there was evidence of coercion. But, we have endeavored to demonstate that it did have such right, and believe ourselves to be correct in this position. If so, there is no substantial evidence in the record to support the board's finding of coercion affirmed by the court below.

This Honorable Court has held that under Section 10(e) of the Act "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' "

National Labor Relations Board v. *Columbian Enameling & Stamping Company*, 306 U. S. 292, 300.
Consolidated Edison Company v. *National Labor Relations Board*, 305 U. S. 197, 229.

Tested by such rule the board's findings are without support. They are sought to be upheld by the following circumstances:

1. One Raul Aguilar made disrespectful statements concerning the union. He did, but he was not in any sense of the word a foreman or even a supervisory employee, had no authority to hire or discharge anybody and no right to make or custom of making recommendations in this respect. He was just a billing clerk like other ordinary employees (P. P. Co. Appdx. 132) and under his constitutional right of free speech was at liberty to express whatever opinions of the union he had, whether good or bad. There is absolutely no evidence that any company official with authority to take corrective action ever knew of any of the uncomplimentary remarks which he had made until the trial of this case, and most assuredly they were not authorized.

2. Foreman Higdon is said to have stated to Juan Araujo: "Johnny, they want to see you down in Mr. Peyton's office," and turning to leave said: "We are going to get you guys in the union one by one, especially you boys with the mustaches" (Board Appdx. 56).

In the first place Higdon was not Araujo's foreman at all. There can be no dispute about that. He was foreman of the sausage department (P. P. Co. Appdx. 113), while Araujo worked in the pork shipping department (Board Appdx. 55), and his foreman was Nick Gonzales (P. P. Co. Appdx. 33).

In the second place the remark, if made, (and it was denied) was obviously made in a spirit of banter and jest.

Finally, Araujo was never discharged, but on the contrary was to have been made foreman of a new department but for the fact that his own foreman objected to this on the ground that taking Araujo away from him would disrupt his organization (P. P. Appdx. 33-35).

3. Jack Lee was said to have asked Francisco Ledezma, (at a time indefinitely identified as "not more than six months" before the hearing, which began on November 5, 1942), whether he belonged to the union, and whether he knew if others belonged to it (Board Appdx. 45).

At the time this question is supposed to have been asked Jack Lee was not an assistant foreman or even a supervisory employee of any sort. He was merely a cowboy in the feed lots like the rest of them (P. P. Co. Appdx. 117). He was eligible to membership in the union, and could have asked the question with an idea of joining. In any event the law does not forbid the mention of a union in casual conversation:

> Foote Bros. Gear & Machine Corp'n. *v.* National Labor Relations Board 114 F. (2d) 611 par. 4-5, C. C. A. 7— (reversed on improper record 311 U. S. 620, and same holding made again by Circuit Court of Appeals 121 F. (2d) 802).

Furthermore, Ledezma was never discharged, nor was he in any way treated in any manner objectionable to him.

4. Florez, a foreman on the killing floor, was claimed to have been overheard by Roberto Yudico "somewhere close to June" saying that "the union is going to hell right here," and that he was going to get rid of each one of them slowly (Board Appdx. 44).

There is absolutely no evidence or suggestion as to what circumstances led up to the remark, if made, and nothing to show to whom it was supposed to have been addressed, or whether made in serious discourse or as a joke.

None of the discharges of which complaint is made took place in June; there is no evidence that more than one union man was ever discharged for any cause at any time from the department in which Florez was foreman, and it affirmatively appears that Roberto Yudico was never discharged (P. P. Co. Appdx. 22).

5. It was claimed that Gandara had stated to Araujo "I knew all about you, because I got men in that union who go to the meetings and come to me and tell me everything that goes on in those meetings" (Board Appdx. 59). This obviously is the basis of the court's statement that supervisory employees "Spied upon the union's affairs" (S. R. 136).

Consequently the board and the court below not only have chosen to believe Araujo as against Gandara (which they may do under the law), but have gone further and inferred that what Araujo said that Gandara said was true, and further have inferred from this that Gandara reported to the company information which he is inferred to have received by the method which he is inferred to have used, and still further have inferred that the company used, to the detriment of the union, the information which they infer was given to it. Thus the board and the court below have sought to bolster their decision by an inference upon an inference upon an inference, which just isn't permissible:

National Labor Relations Board v. *Pick Mfg. Co.*, 135 F. (2d) 329 par. 7, C. C. A. 7;

Interlake Iron Corp'n. v. *National Labor Relations Board*, 131 F. (2d) 129 par. 4, C. C. A. 7.

6. It is claimed as a matter of evidence against the company that the rule was administered during the union's formative period.

In the first place this is like claiming that the death of a man who died during an eclipse of the moon was caused by the eclipse.

In the second place it is undisputed that the union organizer Allen Williams did not come to El Paso until February 10 or 11, 1942 (Board Appdx. 1), whereas the rule against solicitation had been posted since January 26, 1942 (P. P. Co. Appdx. 61).

In the third place the company had already forbidden solicitation by Muro's independent union (P. P. Co. Appdx. 126, 130, 138 and 165).

And finally it ought to be obvious that the very time at which an employer should post such a rule in an effort to maintain strict neutrality would be at such time when solicitations were apt to be undertaken by rival organizations.

7. J. F. Gandara is alleged to have said to Eugeno Lopez that those "who are going to join the union are going to get fired, and it is going to be too bad for them" and asked him to turn in the names of "any of the boys who belong to the union" (Board Appdx. 9).

Gandara was not a foreman. He had no authority to employ or discharge anybody, but on the other hand was subject to orders of every official of the company (P. P. Co. Appdx. 146-147). He had been issued orders of strict neutrality in labor matters, and consequently disobeyed positive instructions if he made the statements attributed to him (P. P. Co. Appdx. 151, 92, 95-96, 120, 173 and 175).

A servant cannot place tort responsibility on a master unless he is acting within the scope of his authority and in the furtherance of his master's business, and an agent with-

out authority cannot bind his principal in contract. And so, under the National Labor Relations Act, an employer is not to be held liable for sporadic anti-union statements when made by even supervisory employees:

National Labor Relations Board v. *Sands Manufacturing Co.*, 306 U. S. 332, 341-342;

Wilson & Co. v. *National Labor Relations Board*, 120 F. (2d) 913, 920, par. 6, C. C. A. 7;

Martel Mills v. *National Labor Relations Board*, 114 F. (2d) 624, par. 11, C. C. A. 4;

National Labor Relations Board v. *Empire Furniture Co.*, 107 F. (2d) 92, par. 2, C. C. A. 6;

Kansas City Power & Light Company v. *National Labor Relations Board*, 11 F. (2d) 340, par. 8, C. C. A. 8;

Ballston-Stillwater Knitting Co. v. *National Labor Relations Board*, 98 F. (2d) 758, 762, C. C. A. 2;

National Labor Relations Board v. *Swank Products*, 108 F. (2d) par. 2-3, C. C. A. 3.

The company had publicly announced its policy both in writing (P. P. Co. Appdx. 204) and orally (as above indicated) and it had no knowledge of Gandara's statements, if he made them, until the board's witnesses at the trial said he did. Under the circumstances the company had done all that reasonable requirements could possibly dictate to avoid any further entanglement with charges of unfair labor practices.

Be it remembered that all of the statements in disrespect of or prejudicial to the union were denied by those employees charged by the board with having made them, and the trial examiner who saw and observed the witnesses believed those denials. In this connection attention is invited to the fact that Eugeno Lopez, praised by the board as a "forthright, intelligent, and trustworthy witness" (R. 75), was a matter of fact a self-confessed liar (P. P. Co.

Appdx. 6-7). Realizing, however, that under the Act the board is at liberty to rest its decision on the testimony of liars if it feels so disposed, we have not burdened this brief with citations to the record wherein all of remarks unfavorable to the union were denied, but have accepted them for purposes of this argument as having been made in fact.

Nevertheless, even if made as alleged, they create no more than a suspicion against this employer, and under the holdings of this Court and of other Circuit Courts, that is not enough to overcome the undisputed evidence in support of President Miles' direct testimony concerning the reason for the discharge of these employees. Under the circumstances the management of the company had done all that reasonable requirements could possibly dictate.

Conclusion.

We, therefore, submit that the petitioner was not guilty of any unfair labor practice; that the United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the order of the National Labor Relations Board; and that petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

PEYTON PACKING COMPANY, INC.,
Petitioner.

By EUGENE T. EDWARDS,
Its Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 298

PEYTON PACKING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (S. R. 134–137)[1] is reported in 142 F. (2d) 1009. The findings of fact, conclusions of law, and order of the Board (R. 67–103) are reported in 49 N. L. R. B. 828, and the Board's supplemental decision and

[1] References to Volume I of the record, which contains the formal proceedings before the Board, are designated herein "(R.)"; references to the supplementary record of proceedings before the court below are designated "(S. R. —)"; references to portions of the record printed as an appendix to the Board's brief in the court below are designated "(B. A. —)"; and references to portions of the record printed as an appendix to the petitioner's brief in the court below are designated "(P. A. —)."

order (R. 120–123) is reported in 50 N. L. R. B. 355.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 10, 1944 (S. R. 138–140). The petition for a writ of certiorari was filed on July 28, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

The petition (pp. 8–10) purports to set out four distinct questions but, in our view, only one question is presented:

Whether there is substantial evidence to support the Board's findings that petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and its findings that petitioner discouraged membership in a labor organization by discriminatorily discharging nine of its employees, thereby violating Section 8 (1) and (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10.

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

* * * * *

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on May 18, 1943, issued its findings of fact, conclusions of law, and order (R. 67–103), which were subsequently amended in a supplemental decision and order issued on June 10, 1943 (R. 120–123). The facts may be briefly summarized as follows:

Petitioner is engaged in meat packing at El Paso, Texas, and employs about 370 persons (R.

11, 18, B. A. 60–61). On January 30, 1941, shortly after the issuance of an intermediate report in a prior Board proceeding against petitioner, the Employees' Association of the Peyton Packing Co. (hereinafter called the Association), having been found company dominated by the trial examiner, disbanded (32 N. L. R. B. 595, 596–597, 609, n. 11). After the Board issued its decision on June 11, 1941,[2] also finding company domination, petitioner, on September 23rd of that year, posted notices in substantial compliance with the Board's order (B. A. 61, 69–70).

The Union, which filed the charges in the instant case,[3] commenced an organizational drive among petitioner's employees in October or November 1941 (B. A. 2, 131), and petitioner's officials soon became aware of this development (B. A. 72–74, 131, 135, 142). During the succeeding months, an active campaign against the Union, led by petitioner's personnel manager, Gandara,[4] and participated in by foremen and assistant foremen, was carried on (B. A. 8, 9, 14–

[2] Matter of Peyton Packing Company, Inc., 32 N. L. R. B. 595, 598–604, 610.

[3] Amalgamated Meat Cutters and Butcher Workmen of North America, affiliated with the American Federation of Labor (R. 67, 70).

[4] Gandara, in addition to his position as personnel manager (B. A. 73, 85, 86, 127; see also B. A. 8, 20–21, 89) serves as liaison official between petitioner's officers and its employees by virtue of the fact that he speaks both English and Spanish. The officers speak no Spanish while most of the employees are Mexicans who speak no English (B. A. 86, 89, 20–21; see also Pet., p. 6).

16, 18, 21–22, 29–30, 32, 43–46, 48–49, 55, 56, 58–60, 122, 128). As the Board found (R. 73–83), the campaign against the Union included outright threats by Personnel Manager Gandara and Foremen Florez and Higdon of discharge or other discrimination because of union activities (B. A. 9, 43–44, 56, 58–59), attempts by Gandara and Aguilar, who acted as Gandara's agent in this regard,[5] to ascertain the extent of union activities by questioning employees about their own union membership and that of others (B. A. 8, 9, 18, 21–22, 29–30, 48–49, 55, 114, 122), and frank warnings that petitioner knew the identity of the union members because it had "men in that union who go to the meetings and come * * * and tell * * * everything that goes on * * *" (B. A. 14–15, 55, 59–60). Some employees were asked by Personnel Manager Gandara and by Aguilar to report on events at Union meetings (B. A. 9, 15–16), and others were expressly told not to join the Union (B. A. 9, 15–16, 32). In addition, petitioner, as the Board properly found (R. 86), obtained and received reports of the Union's meet-

[5] The Board's finding that petitioner was responsible for the activities of Aguilar (R. 85–86), rested on evidence that Aguilar was an active officer of the company-dominated Association (B. A. 118), that he was a close friend of Gandara who directed petitioner's activities in opposition to the Union (B. A. 118), and that Aguilar was following Gandara's express instructions when he assisted Gandara in conducting an investigation, on behalf of petitioner, of violations of its rule against solicitation (*infra*, pp. 7–9, B. A. 121, 127–128, 132).

ings (B. A. 1–2, 14–15, 55, 59–60, 137–138; 32 N. L. R. B. 595, 605–606).

On January 26, 1942, shortly after petitioner's officials became aware of the Union's efforts to organize the employees, the following notice was posted throughout the plant (B. A. 64, 141):

> NOTICE TO ALL EMPLOYEES
>
> No employee shall engage in solicitation of any kind while on property of this company, or while working on company time. Disregard of this rule will result in immediate discharge, and no exceptions will be made.

There is no evidence that any effort was made to enforce this rule during the succeeding four months. In May, however, the Union's organizing drive reached its peak (B. A. 2) and, as the Board properly found (R. 90), petitioner was aware of this development through its receipt of reports of the Union's activities (*supra,* p. 5). Moreover, beginning about May 11, 1942, Union Organizer Williams made repeated attempts to communicate by phone with J. C. Peyton, chairman of petitioner's board of directors, for the purpose of setting a date for a collective bargaining conference (B. A. 2–3). When he finally reached Peyton on May 19, the latter told him curtly that he had nothing to discuss with him (B. A. 3). That afternoon Williams wrote to petitioner stating that the Union represented a majority of the employees and requesting that a

date for a conference be set to negotiate a contract (B. A. 3, 139). On May 21, 1942, Peyton replied on behalf of petitioner, stating in part (B. A. 140):

> Should the time ever arrive when a majority of our employees believe that it is necessary for someone else to do for them what they have heretofore satisfactorily done for themselves by way of conference and free discussion with the management, and we are furnished with proof that such is the desire of the majority, you may rest assured that we will properly meet that situation when and if it arises.
>
> So long as you do not represent anyone having legitimate business with us, so far as we know, you must surely understand that no useful purpose could be served by granting you an interview.

Shortly before May 15, during the period when Williams was trying to communicate with Peyton, petitioner's Vice-President Harris directed Gandara to investigate violations of the rule against solicitation by members of the Union (B. A. 64–65, 74–75, 92, 135). Gandara selected Aguilar, who had theretofore openly evinced anti-union bias, to assist him in this task (B. A. 121, 124, 128). Gandara and Aguilar questioned employees throughout the plant as to whether or not they had been solicited to join the Union at some unspecified time and place on petitioner's premises (B. A. 128, 48–49, 96–97, 99–100, 109–110, 113–

114). There is no evidence that either Gandara or Aguilar investigated possible solicitation for organizations other than the Union (see B. A. 110).[6]

Gandara reported to Vice-President Harris the names of certain Union members whom he charged with having violated the rule against solicitation (B. A. 65, 75–76). Those so charged were called in for personal interviews before an inquisitorial board composed of petitioner's president, L. F. Miles, two of its vice presidents, H. B. Harris and S. N. Chauvet, its plant superintendent, W. A. Kessler, and Gandara (B. A. 10, 23, 26–27, 30–31, 34, 36, 38–39, 44, 47, 52, 65). In the presence of a stenographer who made a record of the interviews, the employees were asked whether they had solicited on behalf of the Union at some unspecified time or place on petitioner's premises (B. A. 11, 24, 27, 31, 34, 37, 39, 45, 47; see also B. A. 65, 75–76, 89). None of the employees, however, was confronted with the evidence which formed the basis of the charges against him, nor were the workers upon whose statements the charges were based called in for questioning by petitioner's officials during the conduct of this

[6] The testimony that petitioner refused to permit solicitation by political candidates, representatives of charitable organizations, a life insurance agent, and war bond committees—all strangers in the plant—does not tend to show that in this case the rule against solicitation by employees was not enforced with an intent to prevent self-organization (P. A. 67–69, 77).

inquiry (B. A. 13, 27, 37, 75–77, 89, 91–92, 99–100, 111, 112) In the face of denials by many of the employees involved (B. A. 11–12, 13, 24, 31, 34, 35, 37, 39), petitioner's officials merely accepted the hearsay allegations of Gandara despite his known anti-union bias (B. A. 75–77, 79–81, 89–90, 91–92, 99–100, 111–112).

Four employees (Mena, Ochoterena, Diaz, and Quintana) were discharged immediately after their hearings (B. A. 27, 37, 46–47, 52). Five others (Lopez, Barreda, Arciniaga, Alarcon, and Renteria) were dismissed a few days later after petitioner's officials had allegedly "satisfied" themselves by further "investigation" that the charges against them were true (B. A. 10–11, 13, 24–25, 30–31, 33–34, 38–39, 65–67, 79–81, 133–134).

The investigation thus conducted to discover prior violations of a plant rule was unprecedented in petitioner's plant. Thus, no employee had been discharged for violation of petitioner's rule against smoking unless he was actually seen to be smoking (B. A. 133, 67, 83–84), and Gandara was quite unable to explain why this same rule was not applied with respect to solicitation on behalf of the Union (B. A. 132–133).

Most of the discharged employees had been in petitioner's employ for many years; the term of employment in some cases was as high as 18 and 19½ years (B. A. 22, 36, 38, 28, 33, 5, 26, 51–52, 47).

Petitioner contended before the Board that its promulgation of the rule against solicitation in January 1942, shortly after the Union's organizing drive was commenced, was prompted by the fact that in the earlier Board proceeding against it (*supra*, p. 4) the Board had predicated its finding of illegal company-domination in part on the fact that petitioner had permitted activity on behalf of the dominated union during working hours. It sought to attribute the lapse of seven months between the date of the Board's order and the promulgation of the rule to the fact that in January 1942, when the rule was posted, this Court had just issued its first decision in the *Virginia Electric Power* case,[7] on which compliance with the checked-off dues reimbursement provisions of the Board's order had, by agreement, been made dependent (R. 20–21, B. A. 62–63, 72–73, 86–87; see also Pet., pp. 4–5, 17, 20). However, the first decision of this Court in the *Virginia Electric* case announced no rule concerning solicitation either on company time or premises (B. A. 72), and, in any event, the Board's earlier decision against petitioner dealt with activity on company time, not on the employees' own time (32 N. L. R. B. 595, 599, 601, 602, 604).

Petitioner further contended that its sudden sweeping enforcement of the rule in May 1942 was prompted not by the fact that the Union had

[7] *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469.

at that time reached the peak of its organizing drive, but by a complaint made by an employee named Muro which, it is claimed, apprised petitioner for the first time that its rule was being violated (B. A. 64–65, 74–75, 115; see also Pet., pp. 5–6, 20). Petitioner's witnesses, however, admitted that petitioner had been advised of violations of the rule prior to the time of Muro's complaint (B. A. 129, 98–100).

On these facts, the Board found that petitioner had interfered with, restrained, and coerced its employees in the exercise of their statutory rights in violation of Section 8 (1) of the Act by the activity of Gandara, Aguilar, and other representatives described above, by obtaining and receiving reports of the Union's meetings, and by its discriminatory promulgation and enforcement of the no-solicitation rule (R. 86, 101), and that it had discriminated in respect to hire and tenure of employment in violation of Section 8 (3) and (1) of the Act by discharging the nine employees because of their union activity (R. 92, 101). The Board's finding that petitioner's promulgation and enforcement of the rule against solicitation violated Section 8 (1) of the Act rested on two independent grounds: (1) that a rule which forbids solicitation on behalf of a union on the employee's own time constitutes an illegal interference with the employees' right to self-organization unless justified by special circumstances, absent here, which make the rule necessary in order to

maintain production or discipline (R. 87–88); and (2) that petitioner's motive in promulgating and enforcing the rule was to prevent the self-organization of its employees (R. 88–92). The Board's order (R. 101–103), as amended (R. 120–123), directed petitioner to cease and desist from its unfair labor practices, to offer reinstatement to seven of the nine discharged employees, excluding two employees who had stated that they did not desire reinstatement, to make whole all of the discharged employees by paying them the wages lost because of their discriminatory discharges, and to post appropriate notices.

On March 1, 1944, the Board filed in the court below its petition for enforcement of its order. On June 21, 1944, the court handed down its decision enforcing the Board's order (S. R. 134–137). The court stated that "the rule against solicitation, though reasonable and in lawful form, was administered not according to its tenor but in an arbitrary and discriminatory manner" (S. R. 136). It therefore upheld the Board's findings that the discharges were discriminatory "in that they resulted from union membership and activity" (S. R. 137). On July 10, 1944, the court entered a decree enforcing the Board's order in full (S. R. 138–140).

ARGUMENT

1. The decision of the court below does not, as petitioner contends (Pet., pp. 16–17), conflict with

Midland Steel Products Co. v. *National Labor Relations Board,* 113 F. (2d) 800, 805 (C. C. A. 6) or *National Labor Relations Board* v. *William Davies Co.,* 135 F. (2d) 179, 183 (C. C. A. 7), certiorari denied, 320 U. S. 770. In neither of those cases was it denied that promulgation or enforcement of a plant rule is an unfair labor practice if prompted by hostility to, and an intent to interfere with, self-organization, and in each the circuit court of appeals' reversal of the Board's finding of discrimination was based on the absence of evidence of illegal intent. The circuit courts of appeals have uniformly held that a plant rule which is adopted "as a device to obstruct or impede self-organization," and discharges made pursuant thereto, are illegal, *National Labor Relations Board* v. *Denver Tent and Awning Co.,* 138 F. (2d) 410, 411 (C. C. A. 10); *Carter Carburetor Corp.* v. *National Labor Relations Board,* 140 F. (2d) 714, 716, 717 (C. C. A. 8); *National Labor Relations Board* v. *Glenn L. Martin-Nebraska Co.,* 141 F. (2d) 371, 373 (C. C. A. 8). Similarly, the enforcement of an otherwise valid rule in a manner designed to crush union activities is prohibited under the Act. *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 330–333; *Shell Oil Co.* v. *National Labor Relations Board,* 128 F. (2d) 206, 207 (C. C. A. 5); *National Labor Relations Board* v. *National Traffic Guard Co.,* 135 F. (2d) 42, 43 (C. C. A. 5).

The Board here found that petitioner's "purpose in promulgating and enforcing the rule, was to prevent the self-organization of its employees" (R. 89). Since the Board's order was upheld by the court below solely on that ground (S. R. 136–137), there is not here presented the question whether the Board may properly hold that a rule against solicitation on company premises but on the employees' own time is improper, in the absence of special circumstances indicating its necessity. Although the Board in the instant case decided the latter question as an alternative ground for its decision, its order, unlike that in *Republic Aviation Corporation* v. *National Labor Relations Board,* No. 226, this Term, does not require that the petitioner rescind the rule against solicitation (R. 101–103, 120–123), and the court's holding certainly eliminates that question from the case.[8]

2. Whether there is substantial evidence to support the Board's finding that petitioner's promulgation and enforcement of the rule against solicitation was illegally motivated (Pet., pp. 8–10, 11, 19–22) presents no question of general

[8] That question is presented in *Republic Aviation Corporation* v. *National Labor Relations Board*, No. 226, this Term, petition for writ of certiorari filed on July 5, 1944. In that case, the Solicitor General, on behalf of the Board, has filed a memorandum stating that he does not oppose the granting of the petition. The propriety of the decision below in the instant case, however, is in no way dependent on the disposition of the *Republic Aviation* case by this Court, for the reasons stated above.

importance. Moreover, the evidence summarized in the Statement affords full support for this finding, as the court below held (S. R. 136–137).[9]

3. Petitioner contends (Pet., pp. 9, 11, 14, 18–19) that the Board erred in giving weight to Peyton's letter of May 21 (*supra*, p. 7) in arriving at its conclusion concerning petitioner's hostility to the Union. The Board did not find that the sending of this letter was an unfair labor practice, nor did it indicate in any way that petitioner was under a duty to bargain with the Union without requiring a showing of majority status. It merely took into consideration the fact that the tenor of the letter as a whole was manifestly hostile (R. 73, 85, 91). Hence petitioner is in error in asserting a conflict with *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480 (C. C. A. 8); *National Labor Relations Board* v. *Empire Furniture Corp.*, 107 F. (2d) 92 (C. C. A. 6); and *North Electric Manufacturing Co.* v. *National Labor Relations Board*, 123 F. (2d) 887 (C. C. A. 6), certiorari denied, 315 U. S. 818. Those cases hold only that an employer

[9] Cf. *National Labor Relations Board* v. *Denver Tent and Awning Co.*, 138 F. (2d), 410, 411 (C. C. A. 10); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. (2d) 714, 716–717 (C. C. A. 8); *American Smelting & Refining Co.* v. *National Labor Relations Board*, 128 F. (2d) 345, 347 (C. C. A. 5); *Shell Oil Co.* v. *National Labor Relations Board*, 128 F. (2d) 206, 207 (C. C. A. 5); *National Labor Relations Board* v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89, 92–93 (C. C. A. 6).

may demand proof of majority status before granting a union's request that it be recognized as bargaining agent for the employees. Moreover, the Board's order is fully supported without regard to this evidence.

4. Petitioner's various objections to the Board's findings of coercive activities on the part of petitioner's representatives (Pet., pp. 22–28) raise no question of general importance warranting review by this Court. Moreover, the evidence summarized above fully supports the Board's findings in this respect. Indeed, its order requiring petitioner to cease and desist from its interference, restraint, and coercion could rest alone on the express threats of economic reprisal voiced by Personnel Manager Gandara (B. A. 9, 59), or upon his activities in questioning employees about their union activities (B. A. 9, 21–22,, 114).[10] In view of Gandara's peculiar status in the plant (*supra,* p. 4, n. 4) he was, in a literal sense, in a "strategic position to translate to [his] subordinates the policies and desires of the management." *International Ass'n of Machinists v. National Labor Relations Board,* 311 U. S. 72, 80. In such

[10] See *e. g., H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518, 520; *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 181 (C. C. A. 7), certiorari denied, 320 U. S. 770; *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480, 483 (C. C. A. 8); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 592–593 (C. C. A. 7).

a situation, any instructions which petitioner may have given to its supervisors which are not shown to have been communicated to the employees themselves (Pet., pp. 4, 27) could not have mitigated the coercive effect of Gandara's conduct. *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 519, 521. Nor was the petitioner relieved of responsibility, as it contends (Pet., pp. 3-4, 27), by the general notice posted by it during the preceding year in compliance with the Board's earlier order not to support the Association and interfere with self-organization of its employees. Cf. *Solvay Process Co.* v. *National Labor Relations Board,* 117 F. (2d) 83, 85 (C. C. A. 5), certiorari denied, 313 U. S. 596.

CONCLUSION

The decision below is correct and presents no conflicts of decisions or questions of general importance warranting review by this Court. The petition should therefore be denied.

Respectfully submitted.

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